COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

LEVER DEVELOPMENT, LLC and VILLAGE AT OAKDALE ASSOCIATES, LLC Appellant	)	
v.	)	No. 04-10
WEST BOYLSTON ZONING BOARD OF APPEALS, Appellee	)	

RULINGS ON NOTICE OF CHANGE TO APPELLANT'S PROPOSAL, BOARD'S REQUEST FOR REMAND AND APPELLANT'S MOTION IN LIMINE TO DETERMINE BURDEN OF PROOF

Appellants Lever Development LLC and Village at Oakdale Associates, LLC (Lever) have appealed, pursuant to G.L. c. 40B, § 22, and 760 CMR §§ 30.00 and 31.00, a decision of Appellee West Boylston Zoning Board of Appeals (Board) granting, with conditions, a comprehensive permit with respect to property in West Boylston, Massachusetts. Lever has filed a Notice of Change to Appellant's Proposal. The Board contends that Lever's changes to its proposal are substantial and it requests remand of this matter to the Board for further proceedings.[1] The Board also seeks permission to submit additional materials filed late in connection with its response to the Notice of Change. Lever also requests leave to file late a Motion in Limine seeking a determination of whether the Board's decision was a denial or a grant with conditions of a comprehensive permit.

1. The Board also requested a hearing on the Notice of Change. The parties were given an opportunity to present oral argument on the issue.

I. NOTICE OF CHANGE AND REQUEST FOR REMAND

The Committee's regulations provide that if changes to a proposal on appeal are substantial, the presiding officer shall remand the proposal to the Board. However, if "the presiding officer finds that the changes are not substantial and that the applicant has good cause for not originally presenting such details to the Board, the changes shall be permitted...." 760 CMR 31.03(1). In considering whether a proposed change is substantial, the Committee generally first considers whether the proposed changes are identified as examples of substantial change in 760 CMR 31.03(2). In addition, the effect of the proposed changes on local concerns is important. The Committee has previously stated that "changes that lessen the impact of the development on local concerns are not to be considered reasons to remand the proposal to the local Board for further review. 760 CMR 31.03(2)." *Cloverleaf Apartments v. Natick,* No. 01-21, slip op. at 5 (Mass. Housing Appeals Committee Dec. 23, 2002), citing *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 19-21 (Mass. Housing Appeals Committee June 25, 1992).

Lever argues that its proposed changes, whether considered separately or cumulatively, do not constitute a substantial change within the meaning of 760 CMR 31.03(1). Those proposed changes, as described by Lever, are:

1) reduction in the number of buildings from five to four;

2) relocation of the senior building from the high point of the site on the far northeast corner to the low point nearest to the site entrance;

3) reconfiguration of the looped entry road for two-way rather than one-way travel;

4) widening of the roadway to allow for emergency vehicle travel even in the event that cars are parallel parked along the curb;

5) change in pavement cross section detail;

6) reduction of ledge blasting by decreasing the amount of excavation on the high point of the site and relocating the underground utilities from the "cut" to the "fill" portions of the site;

7) decrease in impervious surface area by .8 percent;

8) increase in the total number of bedrooms from 190 to 209;

9) change in the unit mix from 66 two-bedroom and 58 one-bedroom units to 14 three-bedroom, 57 two-bedroom and 53 one-bedroom units; and

10) increase in the proportion of the project reserved for residents 55 years of age and older from 32.3% to 43.5%.

In arguing that these changes are substantial, the Board focuses primarily on the number of units in the plan. It claims that Lever amended its original proposal from a 124-unit project to a 96-unit project. It argues, therefore, that Lever, by again seeking approval of a 124-unit project on appeal, has increased the number of units by more than 10 percent. Lever insists that it never withdrew its original application or formally substituted a revised application, but rather provided the alternative plan for a 96-unit project in response to the Board's requests and as part of a negotiation process.[2]

The Board also requests that, if the Notice of Change is determined not to require remand to the Board, the issue of whether Lever's proposal is for 96 or 124 units be resolved in the *de novo* evidentiary hearing process. Lever argues that this question is foreclosed because the Board did not raise it within 30 days of the conference of counsel. However, the question of what circumstances give rise to a withdrawal of an original proposal presents itself frequently enough in cases before the Committee that it would be useful to address this issue, even though it was raised late by the Board, and I will address it here.[3]

During the Chapter 40B process, it is common practice for developers to submit alternative proposals to zoning boards in an effort to reach agreement on a project. This Committee has noted that "designing, financing, and getting state approvals for a housing

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2. The supporting documents the Board seeks to have considered are 1) revised project plans prepared by Lever showing a 96-unit proposal that the Board argues shows a drastic reduction in density and removal of a large building from the most topographically challenging portion of the site; 2) a revised site eligibility application that Lever submitted to DHCD in January 2004 that provided for 89 units; and 3) an email from Lever to the Board's acting chairman noting an increase in the number of units from 89 to 96.

On this issue, Lever submitted the Affidavit of Brian Lever, the developer's principal, attached to which are copies of minutes of proceedings in this matter before the Board on February 10, March 8, March 30 and April 15, 2004, as well as a letter dated April 7, 2004 from counsel for Lever to the chairman of the Board. For the purposes of reviewing the Board's request for remand, I have considered all of these documents.

3. This issue was expressly discussed at the Conference of Counsel, and the Board was advised that it should raise the issue within 30 days of that conference, but did not do so.

project ... is 'a dynamic, constantly evolving process....'" *CMA, Inc.*, No. 89-25, slip op. at 20, quoting from *Crossroads Housing Partnership v. Barnstable*, No. 86-12, slip op. at 17 (Mass. Housing Appeals Committee Mar. 25, 1987). "[I]t is to be expected that changes will be made in it throughout the entire development process ... to improve it, to meet objections, or to meet changing conditions...." *Crossroads Housing Partnership*, No. 86-12, slip op at 17. Thus, the Committee has noted it favors a process that fosters the contributions and incorporation of town concerns over one that involves simple acceptance or rejection of a developer's proposal.

As most Chapter 40B cases involve significant negotiation among the parties, frequently at all stages of the proceedings, a determination of an absolute withdrawal of an original proposal should not be made lightly. Frequently developers submit alternate proposals simply as part of settlement negotiations. Boards, however, are not required to consider multiple proposals and are free to request that a developer formally withdraw a proposal before submitting a replacement plan. "General land use permitting principles allow the developer to place a proposal before a board, and require the board to approve or reject it. Though it is common for the parties to consider alternatives or even entirely different proposals during informal *negotiations*, the developer cannot *require* the board to formally respond to two or more entirely different proposals simultaneously, nor can the board *require* the developer to submit a second, different proposal." *Settlers Landing Realty Trust v. Barnstable*, No. 01-08, slip op. at 2 (Mass. Housing Appeals Committee Ruling Sept. 22, 2003), citing *CMA, Inc.*, No. 89-25, slip op. at 24. A requirement that a developer formally abandon an original proposal in order for discussions to occur regarding an alternate plan, though, may deter, rather than foster, the parties' working together to reach a mutually satisfactory resolution. For this reason, unless a developer has submitted an unequivocal written notification to a board withdrawing its initial application in favor of an identified alternate proposal, the Committee is reluctant to find that a withdrawal of the original proposal has been effected. In this case, the submissions of the parties show no such unequivocal notification that would lead me to find that Lever has withdrawn its original proposal for 124 units. Lever's affidavit and attached documents indicate that the developer affirmatively advised the Board that it had not abandoned its original application. The documents submitted by the Board indicate exploration of alternatives, but no formal withdrawal of the original proposal.

In any event, the number of units Lever proposes to the Committee on appeal is the same as that in its original application. Although the developer subsequently submitted plans for a smaller project, the reduction in the project size was made at the seventh hearing session of a total of eight sessions. Thus the Board had the 124-unit proposal before it for consideration for most of the hearing process. If a remand were granted, the Board would be permitted to consider only new issues raised by the proposal. 760 CMR 31.03(1). The Board has already had an opportunity to consider the 124-unit project, and therefore this aspect of the proposal does not warrant remand.

The Board additionally argues that the proposed changes affect the stormwater management system and therefore must be presented to the Board for consideration. A review of the Board's decision, however, shows that the Board made no findings concerning stormwater management, but rather imposed the following condition regarding this topic:

> The stormwater management system shall be designed to meet or exceed all best management practices and the Massachusetts Stormwater Management Guidelines. Construction of the stormwater management system shall not commence until the Board's engineer has forwarded written approval of the final system design to the Board of Appeals. The Board's engineer shall approve the maintenance schedule for the stormwater system and the final design thereof. The Applicant shall also submit the stormwater management system design for the review and approval by the Massachusetts Division of Conservation and Recreation.

Board decision, p. 10, ¶ 28. Thus the Board earlier determined that it would not evaluate the stormwater management issues as part of its hearing process. Remand for this purpose is therefore unwarranted. See *CMA, Inc.*, No. 89-25, slip op. at 20.

The Board does not expressly argue that the other changes are significant. Indeed, none of the specific changes proposed constitutes an identified substantial change under the Committee's regulations. Even when considered in the aggregate, they are not substantial. For example, to the extent that the new proposal may involve a slightly larger building footprint, this element must be considered in light of all of the changes proposed, including the reduction in the impervious surface. The Committee's regulations do not set the outer bounds of the characteristics of an insubstantial change. Rather, they set out "some examples of what circumstances ordinarily will and will not constitute a substantial change." 760 CMR 31.03(2)(b). See, *e.g., Crossroads Housing Partnership*, No. 86-12, slip op. at 15-16. Where, as here, the changes are not so great as to represent a totally new or different proposal, and it

seems unlikely that the local board will reverse its previous decision, remand would only result in delay, and merits are best resolved in the *de novo* proceedings before this Committee. *CMA, Inc.*, No. 89-25, slip op. at 20; *Sherwood Estates v. Peabody*, No. 80-11, slip op. at 3-4 (Mass. Housing Appeals Committee Apr. 30, 1982), *aff'd*, No. 82-1114 (Essex Super. Ct. Dec. 3, 1984). Any purpose of a remand has already been met.

Finally, Lever stated it has proposed these changes to its proposal to respond to new information that was not available to it when the comprehensive permit application was originally filed with the Board. I find that the changes proposed do not constitute a substantial change requiring remand of these proceedings and that Lever has sufficient cause for not originally presenting these changes to the Board.

The Board's request for remand is denied.

II. MOTION IN LIMINE TO DETERMINE BURDEN OF PROOF

Lever seeks a determination that the Board's grant of a comprehensive permit with conditions is actually a denial and the parties' burdens of proof should be allocated accordingly.[4] Lever argues pursuant to 760 CMR 30.07(2)(d) that there is no logical connection between the conditions of the permit granted by the Board and legitimate local concerns. Lever specifically argues that in granting a permit conditioned on the construction of 68 rather than 124 units, the Board's decision represents an arbitrary and dramatic reduction in the number of units, and therefore constitutes a denial of the comprehensive permit application.

In reviewing the conditions imposed by the Board to determine if they constitute a *de facto* denial, the Committee must determine whether the Board's decision "manifests a reasonable basis" for the required change. *Settlers Landing Realty Trust v. Barnstable*, No. 01-08, slip op. at 3-4 (Mass. Housing Appeals Committee Ruling Sept. 22, 2003). The Committee examines the decision of the Board without resort to external evidence. *Id.* When there is no

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4. Lever seeks leave to file its motion in limine after the time period for preliminary motions had expired. See 760 CMR 30.07(2). Lever filed its motion following the issuance of a decision by the Superior Court in *9 North Walker Street Development, Inc. v. Commonwealth*, Bristol Super. Ct. No. BRCV2003-0767 (Memorandum of Decision Dec. 28, 2004). In that decision, the Bristol Superior Court applied a standard that appeared, on its face, to be stricter than the Committee's standard in *Settlers Landing*. Subsequent to the parties' submission of memoranda on the issue, that matter was remanded to the Committee for application of the *Settlers Landing* standard. It is therefore appropriate to grant the motion for leave to file late.

reasonable basis for a Board's dramatic reduction in a proposed project size, such action will be treated as a denial for the purposes of Chapter 40B. *Id. at 6.* This in turn affects burdens of proof for hearings before the Committee. 760 CMR 31.06.

Condition 1 of the Board's decision requires that: "The project density shall be reduced to no more than 68 units by removing the top story of each of the three buildings. The remaining floors shall remain unchanged." Board Decision at 6. In support of this condition, the Board stated:

> The Board finds that the project's immediate proximity to abutting residential properties will have an adverse impact to the character of the neighborhood and will adversely impact the use and enjoyment of those properties. The Board finds that the height as well as the bulk and density of the project will have an adverse impact. The Board also finds that the traffic generated by the project will contribute to these adverse impacts. The Board finds that these impacts are irremediable but that by reducing the density and height of the project, the impacts may be mitigated to a certain degree.

Board Decision, Findings, p. 4, ¶ 1. The decision also states:

> The Board finds that the project requires severe waivers from the West Boylston Zoning By-laws and Subdivision regulations and that compliance with such local standards would result in only a miniscule fraction of the proposed number of units. Given the longstanding character of the neighborhood and the Property's close proximity behind and adjacent to the neighboring properties, the board finds that there is a valid local concern in maintaining existing standards to the maximum extent possible.

Id., p. 4, ¶ 3. In addition to the Board's concerns on the issues of density, including height and bulk of buildings, proximity to neighboring properties and the character of the neighborhood, the Board's decision also expressed concerns about lack of water and sewer access. *Id.*, p. 4, ¶¶ 5, 6.

The only specific explanation for the limit to 68 units may lie in its connection to reducing the height of the buildings by eliminating the top story. The Board points to no local height requirement from which Lever has sought a waiver. Rather it appears to eliminate one story to reduce the number of units, and thereby reduce the density of the project.

Chapter 40B projects almost necessarily require building at a greater density than permitted by local zoning requirements. See, e.g., *KSM Trust v. Pembroke,* No. 91-02, slip op. at 13-14 (Mass. Housing Appeals Committee Nov. 18, 1991). Valid local concerns, such as municipal services, traffic, aesthetics, and overall livability of the surrounding neighborhood, can all be affected by density. *Hastings Village v. Wellesley*, No. 95-05, slip op. at 20 (Mass.

Housing Appeals Committee Jan. 8, 1998). Under the *Settlers Landing* analysis, for a board's regulation of density to establish a nexus with a reduction in the number of units, it must specifically address such related concerns. The Board, however, does not draw a logical connection between its density-related concerns and the specific limitation of the project to 68 units. The decision refers generally to "severe waivers" from zoning bylaws and subdivision regulations sought by the project, and finds a local concern in "maintaining existing standards to the maximum extent possible" to conform to what it described as the "longstanding character" of the neighborhood and the "close proximity" of the project to neighboring property. Board decision, Findings, p. 4, ¶ 3. The Board also characterizes the local concerns as irremediable, but states that reducing the density will alleviate these concerns. A vague reference to alleviation, however, is insufficient to support the specific reduction mandated in the Board's decision. These general references to density or to the effect on the neighborhood are insufficient. See *Settlers Landing,* No. 01-08, slip op. at 5; *Autumnwood, LLC v. Sandwich,* No. 05-06, slip op. at 8 (Mass. Housing Appeals Committee Ruling Nov. 4, 2005) (for board's regulation of density to be reasonable, it must address valid local concerns affected by density).[5]

The Board's decision also lacks a connection to specific local regulations. See *Cirsan Realty Trust v. Woburn*, No. 01-22, slip op. at 5 n.5 (Mass. Housing Appeals Committee June 11, 2003) ("in the absence of exceptional circumstances, [the Committee is] reluctant to consider local concerns that the town has not previously chosen to regulate"), and *Walega v. Acushnet*, No. 89-17, slip op. at 5-7 (Mass. Housing Appeals Committee Nov. 14, 1990) (Committee considered local issue not previously regulated at local level because concern was pressing and no other body was addressing it).

Further, the conditions imposed do not appear to be connected to the Board's stated concerns regarding the provision of water and sewer service. The Board's decision states that "the Applicant has not yet established a viable water source" and may be required to complete substantial infrastructure improvements before it will be provided with water. Board decision, Findings, p. 4, ¶ 5. In addition the Board found that "the Applicant may not presently be able

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5. The Board argues that the reasons for its reduction in the number of units should be addressed during the *de novo* evidentiary hearing of this matter. However, this ruling does not preclude the Board's presenting evidence regarding density or its other concerns in support of a denial of the comprehensive permit application.

to secure a connection to or an extension of the intermunicipal sewer system." *Id.*, p. 4, ¶ 6. The Board however also found that "a reduction in project density will reduce adverse impacts to the municipal water and sewer services." *Id.*, p. 5, ¶ 7. The concern expressed by the Board, however related to access to services, not overburdening of services. In any event, the decision draws no connection to the specific reduction of the project to 68 units. See *Settlers Landing*, No. 01-08, slip op. at 5.

The Board additionally found that the conditions imposed would not render the project uneconomic. Board decision, Findings, p. 5, ¶ 13. That consideration is not properly part of the Board's analysis of whether its local concerns outweigh the regional need for affordable housing. To the contrary, the Board must approve or reject a project as it is submitted. *CMA, Inc.*, No. 89-25, slip op. at 24. Even if the Board's analysis were to prove true as a factual matter, just because a project could be economic at a smaller size does not grant the Board the authority to require such a reduction in size. See *Hastings Village*, No. 95-05, slip op. at 17. The Board's role is to "review the proposal submitted to it, and … not redesign the project from scratch." *CMA, Inc.*, No. 89-25, slip op. at 24-25; *Sheridan Development Co. v. Tewksbury,* No. 89-46, slip op at 3 n.3 (Mass. Housing Appeals Committee Jan. 16, 1991) (role of board is to review project only to determine whether requested exemptions to existing town regulations and requirements should be permitted).

Although it is permissible for a board to impose a condition that limits the size of a development when that is necessitated by the site or the surrounding area, the Board should not set an arbitrary limit to the number of housing units. *Hastings Village, Inc.*, No. 95-05, slip op. at 10 n.4 (Housing Appeals Committee Jan. 8, 1998), *aff'd*, No. 00-P-245 (Mass. App. Ct. Apr. 25, 2002), citing CMA, Inc., No. 89-25, slip op. at 24. Here, however, the decision does not show that the site necessitates the specific size limitation mandated. It therefore fails to manifest a reasonable basis for the specified reduction as required by *Settlers Landing*.

The Board's decision does not articulate a reasonable basis for the reduction in units. The permit is deemed to be a *de facto* denial of Lever's application, and burdens of proof during the hearing before the Committee will be allocated accordingly, pursuant to 760 CMR 31.06.

Housing Appeals Committee

Date: December 16, 2005

Shelagh A. Ellman-Pearl
Presiding Officer